No. 18-443

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The Eighth Amendment bars the execution of petitioner Bobby James Moore. The ruling of the Texas Court of Criminal Appeals ("CCA") impermissibly relies on harmful lay stereotypes and non-clinical criteria, disregards medical standards, and flouts this Court's prior decision in this case. *See* Pet. 16–26.

The prosecutor charged with responsibility for this criminal case under Texas law—the Harris County District Attorney ("District Attorney")—has unequivocally stated her position that Moore "is intellectually disabled and cannot be executed." Resp. Br. 9–10. The District Attorney agrees with Petitioner that "the Court should summarily reverse the opinion of the [CCA]." *Id.*

The Attorney General of Texas ("Attorney General") now has filed a motion to intervene. The Attorney General is a nonparty who did not participate in the proceedings in either the state habeas trial court or the CCA, and is not given any role or responsibility in this case by Texas law. In a separate filing, Petitioner opposes the Attorney General's intervention motion—an intervention motion that asks this Court to give the Attorney General what Texas law does not. As noted in that filing, Petitioner has no objection to the Court considering the Attorney General's 14-page submission as an amicus curiae brief.

Accordingly, this Reply will briefly address the Attorney General's observations about this case. The Attorney General strains unsuccessfully to square the CCA's opinion with this Court's precedent. In doing so, he conspicuously ignores critical aspects of

this Court's decision, of the CCA's decision, and of the Petition.

The Attorney General also erroneously attempts to minimize the constitutional harm that would flow from requiring the execution of a defendant over the objection of both the prosecutor and the defendant that the defendant is intellectually disabled and may not be executed. That is a course of action that this Court never has permitted, and it is a course of action that should not be sanctioned in this case for the first time.

Petitioner respectfully submits that the Court should grant the petition and summarily reverse the judgment below.

I. The CCA's Ruling Relies On Lay Stereotypes, Conflicts With Medical Standards, And Is Inconsistent With This Court's Prior Decision.

The Attorney General offers a scattershot series of contentions in arguing that the CCA's opinion is consistent with medical standards and with this Court's previous decision in this case. For a number of reasons, the Attorney General's observations fail to salvage this deeply flawed opinion. All of the reasons relate to the fundamental problem of the CCA decision, and its inconsistency with this Court's previous decision—namely, the CCA's reliance on lay stereotypes and non-clinical factors, rather than medical standards, despite this Court's explicit direction to the contrary.

First, as a threshold matter, the Attorney General simply ignores a glaring, fundamental flaw at the heart of the CCA's decision: its reliance on lay stereotypes of people with intellectual disabilities.

In this Court's previous decision in this case, the Court made clear that "lay perceptions of intellectual disability" may not inform the intellectual-disability inquiry, explaining that "the medical profession has endeavored to counter lay stereotypes of the intellectually disabled." *Moore v. Texas*, 137 S. Ct. 1039, 1051–52 (2017). Despite the clarity of this Court's holding, the CCA resurrected the very same stereotypes that it had previously relied on and that this Court explicitly rejected—such as the fact that Moore once had a girlfriend; that he had an unskilled job at a restaurant; and that he survived on the streets and played pool. *See* Pet. 17–18; Pet. App. 30a, 33a, 35a.

The CCA's reliance on erroneous lay stereotypes conflicts with this Court's decision, as well as with widely accepted medical standards and clinical understanding. As an amicus brief from leading medical organizations emphasizes, the CCA's renewed reliance on lay stereotypes is harmful and erroneous: "People with intellectual disability may be able to 'play[] pool for money,'" "have romantic relationships," and "hold down a basic job such as working in a restaurant." Br. of Am. Psychiatric Ass'n *et al.* as *Amici Curiae* in Supp. of Pet'r ("APA Br.") 8 (alteration in original) (citing medical and clinical standards). The CCA's extensive use of damaging and inaccurate lay stereotypes is a cornerstone of the CCA's current ruling—and yet the Attorney General's submission to this Court ignores it. Like the CCA's prior invention of the *Briseno* factors, moreover, the CCA's reliance on lay stereotypes—that a person with intellectual disability cannot have a girlfriend, or have a job, or play pool—is inconsistent with medical standards and clinical understanding. The CCA's impermissible reliance on

these lay stereotypes itself is sufficient to warrant summary reversal.[1]

Second, repeating a fundamental error of the CCA, the Attorney General wholly ignores powerful evidence of Moore's adaptive deficits—*even though this Court emphasized those very deficits*. In its previous decision, for example, this Court emphasized the evidence of Moore's shortcomings, such as the fact that, at the age of 13, he did not understand the days of the week, the months, the seasons, or how to tell time. *See Moore*, 137 S. Ct. at 1045; Pet. 19. Remarkably, even though this Court emphasized that evidence, the CCA entirely ignored it. The Attorney General does exactly the same thing—and says not a single word about the evidence of adaptive deficits highlighted by this Court.

Third, the Attorney General likewise ignores the fact that the CCA summarily rejected important clinical evidence on the basis of the CCA's own lay

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[1] As explained in the Petition, the CCA even applied, in all but name, several of the *Briseno* factors that this Court unanimously invalidated. *See* Pet. 18. The Attorney General attempts to minimize the CCA's *sub silentio* reliance on its unanimously-repudiated *Briseno* factors, Attorney General's Mot. ("AG Mot.") 12, but the CCA on three separate occasions invoked criteria identical to the discredited *Briseno* factors (and twice used virtually verbatim recitations of them). *See* Pet. App. 20a–22a, 34a, 36a–37a; *id.* at 97a (Alcala, J., dissenting) (CCA used factors that are "eerily reminiscent of the seven *Briseno* factors"). "It is difficult to read the CCA's opinion . . . without seeing it as a repackaging of the CCA's rejected *Briseno* analysis." Br. of Donald B. Ayer *et al.* as *Amici Curiae* in Supp. of Pet'r 10. *See also, e.g.*, Br. of Am. Bar Ass'n as *Amicus Curiae* in Supp. of Pet'r 8 ("In many instances, the CCA's most recent opinion restates the precise language of the *Briseno* factors, while omitting only the *Briseno* case name.").

conclusions and intuitions, not on the basis of any clinical evidence, standard, or testimony. Pet. 18–21. Most conspicuously, the CCA rejected the clinical results of Dr. Robert Borda—who found that Petitioner scored the lowest score Dr. Borda had ever recorded on executive functioning, a key element of adaptive functioning—based on the CCA's own assumption that Petitioner must have been "malingering" even though no expert (including the State's expert) supported rejecting the clinical test result on that basis and even though medical and clinical standards emphasize that such a conclusion should be made only by the clinician administering the test. *See* Pet. 20 & n.7. While providing sweeping statements of support for the CCA's decision, the Attorney General fails to address this fundamental problem with the CCA's decision.[2]

Fourth, the Attorney General seeks to defend the CCA's opinion by arguing that the CCA merely relied on the opinion of the State's expert. *See* AG Mot. 8. But there are fundamental problems with this attempted reliance. The State's expert unquestionably relied, at least in part, on the unanimously repudiated *Briseno* framework. She explicitly testified that the *Briseno* framework was "*one piece of the pie*" of her analysis and "one piece of information." *See* JA 163–64 (emphasis added). Moreover, she explicitly

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[2] The Attorney General also does not address the fact that the CCA likewise ignored other significant expert testimony and testing establishing that Moore's adaptive deficits "fell roughly two standard deviations below the mean in *all three* skill categories." *Moore*, 137 S. Ct. at 1046; *see also* Pet. App. 101a (Alcala, J., dissenting) ("[Moore's] adaptive functioning test scores fell more than two standard deviations below the mean in all three skill categories.").

linked her evaluation of one aspect of Moore's conduct to the third *Briseno* factor ("leadership"). *Id.* Separately, without expressly mentioning *Briseno*, she also placed particular significance on the "behavior that surround[ed]" Moore's commission of the crime and that it purportedly showed "a level of planning and forethought," JA 147—an emphasis identical to that called for by the seventh *Briseno* factor. *See Ex Parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004). Here, too, the Attorney General simply ignores that testimony. There can be no question that the repudiated *Briseno* framework was, in the expert's own words, "one piece of the pie"—i.e., an element—of her analysis.

The Attorney General's attempted reliance on the State's expert as a cure-all for the CCA's flawed opinion has other pronounced deficiencies as well. Both the Attorney General and the CCA, for example, do not even discuss the fact that this Court's previous decision considered and rejected the CCA's prior reliance on the State's expert. *See, e.g.*, *Moore*, 137 S. Ct. at 1047, 1050–51. And, both in its original opinion and on remand, the CCA emphasized certain factors—such as the fact that Petitioner once had a girlfriend and the CCA's own lay intuition that Petitioner was "malingering" on a clinical test administered by a different expert, Pet. App. 33a, 37a–38a—that are nowhere to be found in the testimony of the State's expert.[3]

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[3] Nor can the Attorney General's attacks on Petitioner's experts salvage the CCA's opinion. *See* AG Mot. 8. Although the Attorney General's attacks are unavailing for several reasons, two are particularly pronounced. First, the CCA explicitly reasserted its previous appraisal of the experts from its original opinion, Pet. App. 16a, even though the CCA previously had

Fifth, the Attorney General tries to explain away the CCA's extensive focus on Moore's adaptive strengths, rather than his deficits, as a mere "survey[]" of evidence consistent with the framework of the DSM-5. AG Mot. 9–10. But this flies in the face of this Court's previous recognition that "the medical community focuses the adaptive functioning inquiry on adaptive *deficits*." 137 S. Ct. at 1050 (emphasis in original). As noted, moreover, both the CCA and the Attorney General ignored what this Court called "the considerable objective evidence of Moore's adaptive deficits"—including the evidence emphasized by this Court (such as Moore's conspicuous shortcomings at the age of 13). *Id.*; *see also, e.g.*, APA Br. 4 (explaining the "medical consensus" that "intellectual disability must be diagnosed where there are sufficient deficits in adaptive functioning, even where there is also evidence of adaptive strengths"). By "recit[ing]" Moore's "perceived strengths" while ignoring his adaptive deficits, the CCA conducted the same kind of analysis that this Court rejected previously. *Moore*, 137 S. Ct. at 1050; Pet. 21–22.[4]

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found Petitioner's experts not credible because they "applied a more demanding standard to the issue of adaptive behavior than [the CCA had] contemplated for Eighth Amendment purposes [in *Briseno* and its progeny]," *id.* at 194a. This Court, of course, rejected the CCA's less "demanding" standard, thereby eliminating this as a legally sound ground for rejecting Petitioner's experts. Second, while the Attorney General criticizes one defense expert (Dr. Borda) for changing his view, that expert explicitly relied in part on intervening changes and clarifications in the current medical standards, JA 7–9, 21, 27; *see also* Pet. 22 n.9, which this Court held to be an appropriate and required consideration, *Moore*, 137 S. Ct. at 1048–49.

[4] Contrary to the Attorney General's claim, the CCA also repeated its "arbitrary offsetting of deficits against unconnected

The CCA's focus on Moore's supposed strengths conflicted with clinical standards for the additional reason that it impermissibly emphasized Moore's behavior in prison. *See* Pet. 23–24. The Attorney General's attempt to paint the CCA's reliance on Moore's conduct in prison as consistent with the DSM-5, AG Mot. 11, is singularly unpersuasive, as the APA itself has explained. *See* APA Br. 10–11 (criticizing the CCA's extensive reliance on conduct in prison); *see also* Resp. Br. 7 (CCA "continued [its] errant analysis" by its "overreliance" on Petitioner's asserted conduct in prison).

Sixth, persisting in its efforts to minimize fatal flaws in the CCA's ruling, the Attorney General argues that the CCA's application of an unconstitutional, self-invented relatedness requirement amounts to "nothing more than the CCA correcting unwarranted inferences drawn by the trial court." AG Mot. 11–12. Far from it. In fact it was the CCA, not the state habeas trial court, that relied on non-clinical and "unwarranted inferences" to penalize Moore for failing to rule out all alternative causes of his adaptive deficits—including deficient social behavior, failure to obtain a job, and eating out of trash cans despite two bouts of food poisoning. *See,*

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strengths" that this Court previously invalidated. *See Moore*, 137 S. Ct. at 1050 n.8; *see also* AG Mot. 10–11. For instance, the CCA relied on Moore's purported skills in the *conceptual* domain (his alleged "skill with writing and math") to justify disregarding evidence of his deficits in the *practical* domain (including his difficulties living independently or maintaining a safe environment). *See* Pet. App. 35a–37a. Similarly, the CCA weighed evidence of Moore's supposed "ability to stand up for himself and to influence others" as evidence that he was not deficient in *either* social *or* practical skills. *See id.* at 34a–35a, 36a.

e.g., Pet. App. 33a (CCA relies on purported failure to show that adaptive deficit was "*related* to any deficits in general mental abilities," rather than "emotional problems" (emphasis added)); *id.* at 35a–36a (adaptive deficits not "*related* to intellectual deficits" (emphasis added)); Pet. 24–26; Pet. App. 70a (Alcala, J., dissenting) (CCA's use of relatedness on remand "is essentially the same flaw that the Supreme Court highlighted in *Moore* when it criticized this Court's analysis of the 'relatedness' issue"). The CCA's reliance on its own idiosyncratic interpretation of relatedness violated both clinical standards and this Court's decision. It once again creates "an unacceptable risk that persons with intellectual disability will be executed." *Moore*, 137 S. Ct. at 1051.

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The CCA's decision relies on harmful lay stereotypes and non-clinical criteria, rather than medical standards and clinical evidence, and it conflicts with this Court's decision in this case. The Court should grant the petition and summarily reverse.

II. The Prosecutor And Petitioner Agree That Petitioner Is Intellectually Disabled And May Not Be Executed.

Respondent District Attorney is the entity responsible for this criminal case under Texas law. *See* Tex. Code Crim. Proc. Art. 2.01; *Saldano v. State*, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002). As the District Attorney did in the CCA on remand, she has filed a brief in this Court unequivocally stating that "the State of Texas . . . agrees with [Moore] that he is intellectually disabled and cannot be executed" and

that "the Court should summarily reverse the opinion of the [CCA]." Resp. Br. 9–10.

It is settled that the Eighth Amendment presents "an acute need for reliability" in capital cases. *Monge v. California*, 524 U.S. 721, 732 (1998). As explained in the Petition, that heightened need for reliability to justify an execution cannot be satisfied when, as in this case, the prosecutor and the defendant agree that the defendant is intellectually disabled and should not be executed. Pet. 27–28.

The Attorney General acknowledges that he is not a party in this case and does not have responsibility for the prosecution or penalty at issue. AG Mot. 4–5 & n.1. Moreover, he identifies no case in which this Court has permitted an execution when both the prosecutor and the defendant agree that the defendant is intellectually disabled and should not be executed. Instead, the Attorney General criticizes the District Attorney for changing the State's position. *Id.* at 13.

The Attorney General's criticism is both unwarranted and unavailing. After careful consideration of current medical standards, controlling legal principles (including the rejection of the long-standing *Briseno* framework), and the prosecutor's extensive knowledge of this nearly four-decades-old case that the District Attorney had brought and maintained, the District Attorney made the sound, principled, and laudable decision that Petitioner suffers from intellectual disability and should not be executed. *See* Resp. Br. 7–9; Respondent's Brief 28, *Ex Parte Moore*, No. WR-13,374-05 (Tex. Crim. App. filed Nov. 1, 2017).

The Attorney General's disagreement with the District Attorney's exercise of the authority given to her (rather than to the Attorney General) under Texas law does not alter the fact that the only two parties to this case—the prosecutor and the defendant—are in agreement on its proper disposition. As the sole lawful representative of the State in this criminal case, the District Attorney's position is the one that matters for purposes of the Eighth Amendment and its requirement of heightened reliability. For this separate reason as well, the Constitution does not permit an execution in these circumstances.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse. Alternatively, the Court should grant the petition and conduct plenary review.

Respectfully submitted,

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